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IN THE

Supreme Court of the United States

No. 75-54

..... Term, 197.....

LINDA ANN MOUNT and
JEROLD H. MOUNT, her husband,
Petitioner,

v.

HAROLD R. SUMNER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Memorandum and Order of the United States District Court for Western District of Pennsylvania dismissing plaintiffs' motion for new trial is reprinted in the Appendix at pages A2-A6, *infra*.

Jurisdiction

Linda Mount and Jerry Mount instituted this action in the United States District Court for the Western District of Pennsylvania. Jurisdiction was based upon 28 U.S.C. Section 1332—Diversity of Citizenship and Jurisdictional Amount. After jury verdict for the defendant, an appeal was taken to the United States Court of Appeals for the Third Circuit which entered a judgment order affirming the judgment of the District Court.

Questions Presented

1. Does the Supreme Court of the United States take into realistic account the potential for domination of jury deliberation function by the trial judge in a six man jury as opposed to a twelve man jury?

2. Is the Supreme Court of the United States mistaken in permitting a six man jury trial in Civil Trials?

3. After a review of the petitioners' asserted grievances: special verdict questions; a six man jury; no reasoned written opinion from appeals court; a refusal to recognize the claim that the defendant doctor committed malpractice when he did not possess the requisite knowledge of a specialist in obstetrics; does justice require a new trial, a new trial with a twelve man jury, or remanding the case to the United States Court of Appeals for the Third Circuit for a reasoned written opinion?

4. Is it injustice for the United States Court of Appeals for the Third Circuit not to render a reasoned written opinion where the discipline of writing an opinion will cause a contrary result?

5. Has the District Court and the United States Court of Appeals for the Third Circuit done violence to the law of medical malpractice in Pennsylvania by ignoring the law requiring a medical doctor to possess the required knowledge to practice his profession?

Statutory Provision Involved

Section 1332. Diversity of Citizenship; Amount in Controversy: Costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Statement of the Case

Linda Mount and Jerold Mount, husband and wife, and citizens of the State of Ohio, brought this suit against Harold Sumner, a citizen of the State of Pennsylvania, for damages sustained when the defendant committed medical malpractice by reason of his neither having the requisite skill and knowledge of a medical doctor specializing in obstetrical medicine nor exercising such requisite skill and knowledge.

The defendant injured the anal sphincter muscle of wife-plaintiff while delivering her children. The defendant was negligent in that he was unaware that injury to the anal sphincter muscle could occur as a result of this technique of child birth delivery. Further, defendant did not know to look for and repair said injury to the anal sphincter muscle. As a result of non-repairing the injury to the anal sphincter muscle, the muscle eventually completely separated and wife-plaintiff had to undergo corrective surgery. The corrective operation was unable to completely restore the function of her anal sphincter muscle. She is permanently injured and permanently suffers from impairment of the control of her bowel excretion. The physical injury caused by defendant, that is the non-repair of the injured anal sphincter muscle was more than two years before suit was filed, a time in excess of the apparent statute of limitations. The time in which wife-plaintiff learned of defendant's lack of requisite knowledge and skill was within two years of filing suit. Defendant's lack of knowledge could not have been known until defendant admitted his lack of requisite knowledge on giving his deposition and at trial. The plaintiffs did not discover the injury which was the cause of wife-plaintiff's symptoms until after two years. For the sake of emphasis and clarity permit us to state that the injury causing wife-plaintiff's symptoms was the failure to recognize and repair wife-plaintiff's lacerated sphincter muscle.

At the trial of the claim against defendant, plaintiffs assert the Trial Judge submitted fallacious and jury-dominating written interrogatories to the jury. Appeal was timely taken. The Third Circuit Court of Appeals sustained the Trial Judge without written opinion. The case was tried in front of a jury consisting only of six jurors.

Petitioners' Argument for Allowance of the Writ

At trial the Court submitted written special verdict questions to the Jury; they are:

1. Did plaintiffs know or should they have known on or before September 27, 1970, the physical condition of Linda Ann Mount for which they now claim damages existed?

ANSWER "YES" or "No" .....

2. Did plaintiffs know or should they have known on or before September 27, 1970, the alleged cause of the injuries to Linda Ann Mount for which they now claim damages?

ANSWER "YES" or "No" .....

3. Was there any negligence on the part of Dr. Harold R. Sumner which was the proximate cause of the injuries to Linda Ann Mount?

ANSWER "YES" or "No" .....

4. What is the amount of damages sustained by Linda Ann Mount as a result of the defendant's negligence?

$.....

5. What is the amount of damages sustained by Jerold H. Mount as a result of the injuries to his wife, Linda Ann Mount?

$.....

The Jury deliberated and came back to the court and asked for help with the special verdict questions. The Jury deliberated again and asked the Court for help with the special verdict questions. After the second inquiry the Jury deliberated further and entered an award for the defendant by answering the first two questions in the

affirmative. It is suggested that the Jury in its deliberation and in its two requests for help was trying to overcome the distortion that the special verdict questions did to the facts and the pertinent law.

The plaintiffs assert that the special verdict questions are fallacious. First, they are fallacious because of omission. They omit plaintiffs' theory that the defendant was negligent because he did not have the requisite knowledge of a medical doctor specializing in obstetrics. The plaintiff offered testimony that the defendant lacked knowledge that an anal sphincter muscle could be severed by the techniques of delivery of birth he employed. This lack of knowledge was the cause of his not looking for a severed anal sphincter muscle and of course, not repairing it. Plaintiffs' cause of action based on defendant's lack of knowledge can only date from the time the lack of knowledge was admitted by the defendant. Such lack of knowledge was not admitted until depositions were taken during discovery on January 3, 1973. The lack of requisite knowledge was affirmed during trial by defendant on cross-examination.

Second, the special verdict questions are fallacious because they contained latent ambiguities. The injury of which the plaintiffs complain is the non-repair of wife-plaintiff's lacerated anal sphincter muscle. The symptoms that exhibited themselves were incontinence and lack of control of flatulance. In question number one (1) the Court lumped the non-repair of the lacerated anal sphincter muscle, the incontinence, and the lack of control of the flatulance under the term "physical condition." The Court in question number two (2) tells the jury the plaintiffs only have one cause of action when under the evidence they had two causes. One is based on the non-repair of the

lacerated anal sphincter muscle. The other cause is based on the lack of professional knowledge possessed by defendant—defendant's lack of understanding that he should look for a lacerated anal sphincter muscle as a possible fault of the technique of delivery of birth he employed.

Third, the special verdict questions are fallacious because they express a misstatement of the law of Pennsylvania. The law of Pennsylvania is that the Statute of Limitations begins to run only upon the discovery of the agency of injuries. Ayers v. Morgan, 397 Pa. 282, 154 A 2d 788 (1959). That it was held that:

The Pennsylvania Statute of Limitations providing that every suit brought to recover damages for injury wrongfully done to the person, in *case* where injury does not result in death, must be brought within two years from time *when* injury was done and not afterwards, began to run against patient's action against surgeon for alleged malpractice, not when surgeon allegedly left sponge in patient's abdomen during operation, but when patient almost nine years later discovered alleged presence of sponge in his abdomen.

The six member jury which plaintiffs had to submit to does not have the internal strength and dynamics to overcome the directions of a trial judge even when they are mistaken. This is especially true when the direction is in writing, expressed in excellent grammar and phrased with masterful rhetoric. Despite the evidence, the law and the argument of counsel, it was too much for the jury to overcome the dominating effect of the court. A group larger than six people is needed to be strong enough to overcome the force and direction of the trial court. A twelve man jury is needed to give the necessary strength.

On appeal the trial court was sustained by the Circuit Court of Appeals for the Third Circuit. The plaintiffs asked the Third Circuit to aid the plaintiffs and submitted a written argument and brief demonstrating where the trial court violated the law of Pennsylvania in regard to the Statute of Limitations.

The Third Circuit Court of Appeals sustained the trial judge by entering an order as follows:

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

No written opinion accompanied the order. It is suggested that if the Third Circuit Court of Appeals had reviewed the plaintiffs' contention under the discipline of a written opinion, a new trial would have been ordered. Instead, the plaintiffs received what amounts to a post card opinion.

The stature of the trial judge, the reputation of defense counsel, the possible belief that the Statute of Limitations should be applied in a way other than the Pennsylvania State Court applies it are factors that can effect and most naturally could effect the resultant judgment. Plaintiffs assert that the requirement of writing a well reasoned opinion is the only real protection they have to keep harmful irrelevancies from influencing a case.

While it is understandable that the appellate court wishes to avoid inexcusable delays and it is understandable that

some things may not be convenient or agreeable, it appears to the plaintiffs to be intolerable that expediency takes away the one thing that the plaintiffs believe will give them justice on appeal; namely, a written opinion.

We may speculate endlessly how the Circuit Court of Appeals arrived at its decision. This is a harmful thing. The plaintiffs are only two of the citizens of the United States. They wonder whether their problem, as big as it is to them, will be treated with the same regard they were taught that even little problems are cared for. It appears to them that their problem is not worth more than a post card comment. Hopefully, what we describe is something less than the Due Process due to the citizens of the United States.

Respectfully submitted,

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APPENDIX

Judgment Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2035

LINDA ANN MOUNT and JEROLD H. MOUNT,
Appellants,

v.

HAROLD R. SUMNER.

W.D. Pennsylvania—Civil Action No. 72-802.

Submitted Under Third Circuit Rule 12(6)
April 14, 1975.

Before SEITZ, *Chief Judge*, ROSENN and WEIS, *Circuit Judges.*

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

SEITZ,
Chief Judge.

Attest:

THOMAS F. QUINN,
Clerk.

Dated: Apr. 15, 1975.

Memorandum

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LINDA ANN MOUNT and
JEROLD H. MOUNT, her husband,

Plaintiffs,

vs.

HAROLD R. SUMNER,

Defendant.

Civil Action No. 72-802

The above captioned medical malpractice suit was filed on September 27, 1972, alleging negligent child-birth treatment of the wife-plaintiff during a period which ended on November 10, 1966, the last day she was seen by the defendant-obstetrician. On that date, approximately six weeks after the birth of the wife-plaintiff's third child, she was examined by the defendant and advised by him that her condition was satisfactory. At the time of this examination she made no complaint. On December 25, 1966, six weeks later, however, she suddenly experienced a total loss of anal continency, which, together with other symptoms, plaintiffs now attribute to the defendant's failure to properly repair certain lacerations sustained by her in the course of several child-births at which defendant was her treating physician, including that of September 30,

1966, stated above. The wife-plaintiff consulted other physicians thereafter, but asserts that she was not informed of the cause of her condition until August, 1971. The defendant, of course, pleaded the Pennsylvania two-year Statute of Limitations applicable to personal injury actions.

A jury trial resulted in the following answers of the jury to special interrogatories:

> Did plaintiffs know or should they have known on or before September 27, 1970, the physical condition of Linda Ann Mount for which they now claim damages existed?
>
> Answer Yes.
>
> Did plaintiffs know or should they have known on or before September 27, 1970, the alleged cause of the injuries to Linda Ann Mount for which they now claim damages?
>
> Answer Yes.

Accordingly, judgment was entered for the defendant.

Plaintiffs move for a new trial, asserting precedural and substantive error in the submission and content of the special interrogatories to the jury. The Statute of Limitations issue was clearly a jury question, and this Court perceives no practical alternative to the procedure employed in submitting the same, nor is one suggested by plaintiffs. With respect to substance, the interrogatories were carefully framed to elicit the existence *vel non* of the requisites for application of the statute as enunciated in the controlling Pennsylvania Court decisions. *Schaffer v. Larzelere*, 410 Pa. 402 (1963) teaches:

> ". . . it is the duty of one asserting a cause of action against another to use all reasonable diligence

to properly inform himself of the facts and circumstances upon which the right of recovery is based and to institute the suit within the prescribed statutory period: *Patton v. Commonwealth Trust Co.*, 276 Pa. 95, 119 A. 834 (1923); *Turtzo v. Boyer*, 370 Pa. 526, 88 A. 2d 884 (1952)." Mere mistake, misunderstanding or lack of knowledge is not sufficient to toll the running of the statute: *Ridgway's Account*, 206 Pa. 587, 56 A. 25 (1903); *McEnery v. Metropolitan Life Ins. Co.*, 50 Pa. D & C 395 (1944). If, however, through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the limitation of the action: *Plazak v. Allegheny Steel Company*, 324 Pa. 422, 188 A. 130 (1936) and *Deemer v. Weaver*, 324 Pa. 85, 187 A. 215 (1936). Likewise, if the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitation does not begin to run until discovery of the injury is reasonably possible. See, *Gotshall v. Langdon & Co.*, 16 Pa. Superior Ct. 158 (1901); *Lewey v. Fricke Coke Co.*, 166 Pa. 536, 31 A. 261 (1895); *Ayers v. Morgan*, 397 Pa. 282, 154 A. 2d 788 (1959); *Smith v. Bell Telephone Co. of Pa.*, 397 Pa. 134, 153 A. 2d 477 (1959).

It is the gist of plaintiff's attack that the interrogatories indicated a misinterpretation of the Pennsylvania limitation. They assert that the two-year period did not begin to run until the plaintiffs acquired knowledge of defendant's "culpability". It is this Court's opinion, however, that the defense is, *a fortiori*, available to one who may be without fault, and a plaintiff's knowledge of the "alleged cause of the condition for which damages are claimed", without respect to a defendant's culpability, is the proper test.

Memorandum

The instructions which accompanied the interrogatories were designed and did fully amplify the import of the questions, including the possible effects of fraud or concealment on the part if the defendant, and the jury's answers compelled application of the Statute.

All other trial errors asserted by the plaintiffs in support of their motion have been carefully considered and found to be without merit.

An appropriate order will be entered.

HERBERT P. SORG, *D. J.*

Dated: July 29, 1974.

Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LINDA ANN MOUNT and
JEROLD H. MOUNT, her husband,

Plaintiffs,

vs.

HAROLD R. SUMNER,

Defendant.

Civil Action No. 72-802

AND NOW, this 29th day of July, 1974.

IT IS ORDERED that the Plaintiffs' Motion for New Trial be and same is hereby denied.

HERBERT P. SORG, *D. J.*

cc Kenneth W. Behrend, Esq..
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-54

LINDA ANN MOUNT and
JEROLD H. MOUNT, her husband,
Petitioners,

v.

HAROLD R. SUMNER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-54

LINDA ANN MOUNT and
JEROLD H. MOUNT, her husband,
Petitioner,

v.

HAROLD R. SUMNER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the United States District Court for the Western District of Pennsylvania is set forth on pages A2-A5 of the appendix to petitioner's petition. This opinion is unreported.

The affirmance by the United States Court of Appeals for the Third Circuit is noted at 513 F.2d 626, but not fully reproduced there. This order is set forth on the first page of the appendix to petitioner's petition.

Jurisdiction

Petitioners have invoked the jurisdiction of this Court to issue a writ of certiorari to a Court of Appeals under 28 U.S.C. § 1254(1).

The jurisdiction of the District Court in which this action was instituted was based upon the diversity of citizenship of the parties under 28 U.S.C. § 1332.

Statute and Rule Involved

The Pennsylvania statute limiting the time for bringing actions for personal injuries, Pa. Stat. Ann. tit. 12, § 34; Act of June 24, 1895, P.L. 236. § 2, which reads:

> "Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law."

Rule 48 of the Federal Rules of Civil Procedure, which reads:

> "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Questions Presented

1. Should a United States District Court be permitted to employ a six-member jury in the trial of a civil action?

2. Is a United States Circuit Court required to write an opinion when affirming a District Court's application of state statutory and decisional law in a diversity action?

3. Did the United States District Court for the Western District of Pennsylvania properly apply the Pennsylvania statutory and decisional law governing the limitation of medical malpractice actions?

Statement of the Case

On September 27, 1972, petitioners commenced this action to recover for alleged acts of medical malpractice committed by respondent on and before November 10, 1966. Respondent is an obstetrician who treated wife petitioner during the course of several pregnancies, the last of which terminated in the birth of a child on September 30, 1966. He last saw her in his professional capacity on November 10, 1966, at which time he examined her and advised her that her condition was satisfactory. Approximately six weeks later, on December 25, 1966, wife petitioner experienced a total loss of anal continency and other symptoms which were alleged to be due to respondent's failure to properly repair damage done to the anal sphincter during the course of the several child births.

On January 21, 1974, a jury of six persons and one alternate was selected to hear this case. After the jury was selected counsel for both parties stipulated that the six-member jury would be used and that a verdict of five jurors would be accepted if the jury should be reduced to that number. That stipulation is set forth in the appendix to this brief.

The case was tried before the agreed upon jury and the Honorable Herbert P. Sorg. The question of the Statute of Limitations was submitted to the jury as part of a special verdict and answered as follows:

> 1. Did plaintiffs know or should they have known on or before September 27, 1970, the physical condition of Linda Ann Mount for which they now claim damages existed? Answer *yes*.

2. Did plaintiffs know or should they have known on or before September 27, 1970, the alleged cause of the injuries to Linda Ann Mount for which they now claim damages? Answer *yes*.

In accordance with the District Court's understanding of Pennsylvania's application of Pa. Stat. Ann., tit. 12, § 34 (limiting the time for bringing actions for personal injuries to two years) in medical malpractice actions, judgment was entered in favor of respondent. Petitioners then filed a motion for a new trial, attacking the use and phraseology of the special verdict questions. Substantively, they contended respondent's alleged failure to repair wife petitioner's anal sphincter gave rise to two causes of action; one for the non-repair itself, the other for respondent's not knowing that he should look for a tear in the sphincter. They further contended that the Statute of Limitations only began to run against the second cause of action after respondent's deposition was taken during pretrial discovery.

The District Court denied petitioner's motion for new trial for the reasons stated in the opinion set forth on pages A2-A5 of petitioner's petition. The Circuit Court affirmed the judgment in favor of the respondent without opinion and petitioners then filed the petition now under consideration.

ARGUMENT

I. Petitioners' contention that District Courts should not be permitted to employ six-number juries in the trial of civil actions does not raise a question warranting review by this Court.

In the petition for certiorari petitioners, for the first time, assert it is a mistake to permit the use of a six-number jury in the trial of a civil action.

In *Colgrove v. Battin*, 413 U.S. 149 (1973), this Court held a District Court may, by local rule, require six-number juries for all civil actions. The dissent in that case was largely based on the feeling that such a mandatory rule conflicted with F.R.Civ.P. 48 (permitting the parties to stipulate to a jury consisting of any number less than 12).

In the present case, petitioners, after agreeing to the use of a six-number jury, now assert the use of such a jury should not be allowed. Thus, on the bare assertion that a six-number jury "does not have the internal strength and dynamics to overcome the directions of a trial judge"[1], petitioners asked the Court not only to overrule *Colgrove*, but also to invalidate Rule 48.

In *Colgrove* the Court determined that a six-number jury is as capable of performing its function as is one composed of twelve, stating:

> "Significantly, our determination [in *Williams v. Florida*, 399 U.S. 78 (1970)] that there was 'no discernible difference between the results reached by the two different-sized juries,' 399 US, at 101, 26 L Ed 2d 446, drew largely upon the results of studies of the operations of juries of six in civil cases. Since then, much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in Williams." 413 U.S. at 158-59 (footnote omitted).

There is nothing in the present case which indicates the Court should reconsider its decision in *Colgrove*. In the "directions" which petitioners claim the jury should have been able to "overcome" were, in fact, the trial Court's explanation of his understanding of the Pennsylvania law regarding the limitation of malpractice actions. Such explanations are required by F.R.Civ.P. 49 and the jury is obliged to follow, rather than "overcome", then.

---

[1] Petitioner's petition at 7.

This case thus presents no reason to question the correctness of the holding in *Colgrove*, and, *a fortiori*, no reason to challenge the validity of F.R.Civ.P. 48. Therefore, the question of the propriety of using a six-member jury in the trial of a civil action does not require review by this Court.

II. Petitioner's contention that a Circuit Court should be required to write an opinion when affirming a District Court decision on a question of state law does not raise a question warranting a review by this Court.

In *Taylor v. McKeithen*, 407 U.S. 119 (1972), the Court, while holding that, under the particular circumstances presented in that case, the Circuit Court should have explained why it *reversed* the District Court, stated:

> "We, of course, agree that the Courts of Appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances. See Rule 21, Court of Appeals for the Fifth Circuit Court." *Id.* at 194 n.4.

It is a general practice of the Circuit Courts, and of this Court, to affirm certain decisions of the Courts below without opinion. The Sixth Circuit, for instance, has repeatedly stated:

> " 'It is not the policy or practice of this court in reviewing cases on appeal where a district court has rendered a comprehensive opinion with which we find ourselves in full agreement, to rewrite such an opinion . . . .' " *Stephenson v. Duriron Co.*, 428 F.2d 387 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

Petitioners advance no special circumstance requiring the writing of an opinion here, but apparently contend the Circuit Courts should be required to write opinions in all cases. Indeed, if a Circuit Court may ever decline to write an opinion

it is in a case such as this. Here we have a diversity action in which the only issues presented for the Circuit Court's review were questions of state law. Thus, any opinion the Circuit Court might have written would have been of limited precedential value since it would have been only an attempt to state what the Pennsylvania Courts would have done in a similar situation. Further, the factual setting of this case is not particularly novel and the legal issues raised have been discussed in a number of Pennsylvania appellate Court opinions. *E.g., Schaffer v. Larzelere,* 410 Pa. 402, 189 A.2d 267 (1963); *Ragan v. Steen,* 229 Pa. Super. 515, 331 A.2d 724 (1974).

It is respectively submitted, therefore, that petitioners' assertion that the Circuit Court should have written an opinion presents no substantial issue for review by this Court.

III. Petitioners' assertion the District Court was applying the Pennsylvania statutory and decisional law governing the limitation of medical malpractice actions does not present a question warranting review by this Court.

Although petitioners' complaint alleging respondent's negligence was filed on September 27, 1972, they assert the Statute of Limitations did not begin to run against them until January 3, 1973. Petitioners' petition at 6. This assertion is based on the claim that, on January 3, 1973, they first learned "that the defendant was negligent because he did not have the requisite knowledge of a medical doctor specializing in obstetrics." *Id.* Neither here nor in the Courts below have petitioners cited any authority for the proposition that the reason for a person's negligence gives rise to a cause of action separate from the action for the negligence itself and, indeed, none exists.

The correctness of the decisions below is demonstrated by the opinion of the Superior Court of Pennsylvania[2] in *Ragan v. Steen*, 229 Pa. Super. 515, 331 A.2d 724 (1974), which was decided after the District Court wrote its opinion but in time to be cited in respondent's brief in the Circuit Court. In *Ragan*, the plaintiff consulted his family physician concerning a colony of plantar warts in September of 1968 and was referred to a local hospital for x-ray treatment. Soon after treatment a blister developed but then healed in an apparently normal manner. In November of 1970, however, the tissue in the area treated began to decompose. In March of 1971 the plaintiff filed suit against the radiologist and the hospital. In reviewing the submission of Statute of Limitations issue to the jury, the Superior Court stated:

> "The two year period on actions such as this begins to run when the injury is done. It is undisputed in Pennsylvania that the injury is considered done 'when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable.' *Ayers v. Morgan*, 397 Pa. 282, 290, 154 A.2d 788, 792 (1959). Appellants contend that this point was reached when the blister on the affected area appeared in October 1968 warning the appellee of his damaged condition and that an act of negligence had been committed. Appellee maintains that since the blister healed, the warts were gone and the foot appeared normal, he had no reason to know of the injurious effects of the x-ray until November 1970 when the area began to decompose. Which of these two positions is substantiated by the evidence is a question which the jury must decide. *Schaffer v. Larzelere*, 410 Pa. 402, 189 A.2d 267 (1963); *Ayers v. Morgan*, supra." *Id.* at 519-20, 331 A.2d at 727.

---

[2] The highest court to which an appeal as of right can be taken in a negligence action.

From the above it is apparent that the special verdict questions submitted to the jury were framed to elicit the facts relevant under Pennsylvania law.

More to the point, this is solely a question of state law and its resolution in this case is of no importance to anyone but the parties. As such, it is not a question calling for review by this Court. Supreme Court Rule 19; *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 4 L.Ed.2d 30, 80 S.Ct. 16 (1959) (opinion of Mr. Justice Brennan, in chambers). *Cf. Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

Conclusion

The only issue of any substance in this case was submitted to the jury agreed to by petitioners, and was decided by it. For the reasons set forth above, the arguments presented by petitioners are without merit and certainly not of sufficient moment to warrant granting of a writ of certiorari. It is respectfully submitted, therefore, that petitioners' petition should be denied.

Respectfully submitted,

ROBERT S. GRIGSBY,
THOMSON, RHODES & GRIGSBY,
Attorneys for Respondent.

APPENDIX

Stipulation

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

LINDA ANN MOUNT and JEROLD H. MOUNT,
her husband,
vs.
HAROLD R. SUMNER.

Civil Action No. 72-802.

AND NOW, January 21, 1974, it is stipulated and agreed that a jury of six (6) persons will be used; that one (1) alternate juror be called in the above entitled case. It is further agreed that if the number of jurors is reduced to five (5), that the verdict of the jury will be accepted.

It is further stipulated and agreed that any right to have the jury selected in the presence of a member of the Court and the recording by a Court Reporter of the *voir dire* in the selection of the jury is waived, and I am agreeable to the manner in which the jury was selected.

KENNETH W. BEHREND,
Attorney for Plaintiff.

Jerold H. Mount,
Plaintiff.

Linda Ann Mount,
Plaintiff.

H. GRIGSBY,
Attorney for Defendant.

Harold R. Sumner,
Defendant.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-54

LINDA ANN MOUNT and
JEROLD H. MOUNT, her husband,
Petitioners,

v.

HAROLD R. SUMNER,
Respondent.

REPLY BRIEF IN ANSWER TO DEFENSE BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners reply to the Defense brief as follows. Your Honorable Court must understand that we did not consent to a six-person jury willingly. We had no choice. We asked for a jury trial. The only juries available are six-person juries. The stipulation printed in the Appendix to the defense brief is a stipulation, also required prior to starting trial, to continue with an alternate juror if necessary and to accept the verdict of a five-person jury if necessary.

We urge Your Honorable Court to reconsider Your Decision in Colgrove v. Battin, 413 U.S. 149 (1973), or to amplify it in consideration of the Circuit Court's being able to eliminate oral argument and its written opinion.

KENNETH W. BEHREND,
Attorney for Petitioners.